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Supreme Court of the United States

OCTOBER TERM, 1941.

No. 1058

MIDLAND COOPERATIVE WHOLESALE, INC.,
PETITIONER,

VS.

HAROLD L. ICKES, SECRETARY OF THE INTERIOR, BITUMINOUS COAL DIVISION OF THE DEPARTMENT OF INTERIOR, AND H. A. GRAY, DIRECTOR THEREOF, RESPONDENTS.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT, AND BRIEF IN SUPPORT THEREOF.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

To the Honorable Harlan Fiske Stone, Chief Justice, and the Associate Justices of the Supreme Court of the United States:

Your petitioner respectfully shows:

I.

SUMMARY OF MATTER INVOLVED.

In an administrative proceeding, arising under the provisions of the Bituminous Coal Act of 1937 (50 Stat.

72, Pub. No. 34, 77th Cong., 1st Sess., 15 U. S. C. A., Secs. 828-51), the Bituminous Coal Division issued an order (R. 114) denying the application (R. 7) of petitioner, Midland Cooperative Wholesale, Incorporated, of Minneapolis, Minnesota, the right to register as a "Distributor" under Section 4 II (h) of the Act, but offered petitioner the right to qualify as an "intervening agency" under the provisions of the latter part of paragraph 13 of Section 4 II (i).

Petitioner filed Objections (R. 123) to the order contending it to be unlawful on the ground that it arbitrarily disqualifies petitioner as a "distributor" and offers to allow petitioner to register as an "intervening agency," with arbitrary and unlawful restrictions. The objections were overruled.

A statutory proceeding to review the order pursuant to Section 6 (b) of the Act was prosecuted to the Eighth Circuit Court of Appeals, St. Louis, Missouri. The court affirmed the order (R. 141).

II.

STATEMENT OF MATTER INVOLVED.

(1)—*The Facts.* The essential facts in the case are not disputed. Petitioner, Midland Cooperative Wholesale, is a non-profit wholesale cooperative association organized in 1926 under the laws of Minnesota (R. 7, 91, 102). Petitioner is owned by its common stockholders consisting of approximately 200 retail cooperative associations organized and operating in Minnesota, Wisconsin, Iowa and South Dakota. The common stock in the retail associations is owned by approximately 110,000 individual members of whom approximately 85% are farmers. All of these 200 constituent retail associations are not so-called "*bona fide* and legitimate farmers' cooperative organizations." Since the primary purpose of many of them is to furnish consumers goods to their members, they fall within the category of

consumers cooperatives (R. 40-41). The record does not show to what extent the so-called consumers cooperatives are dominated by farmers. Petitioner serves in the capacity of a wholesaler to (or purchasing agent for) its member associations, supplying them with many types of commodities (R. 133). Since 1934 petitioner has been supplying bituminous coal to about 45 of its constituent retail associations (R. 68). The coal purchased by petitioner for shipment and resale to its retail cooperative member associations is purchased chiefly from producers operating coal mines in West Virginia and eastern Kentucky (R. 71). All coal handled by petitioner is purchased and resold in not less than cargo or railroad carload lots (R. 47).

Under the Minnesota law and its articles of incorporation (R. 133) and by-laws (R. 126) petitioner is required annually to distribute its "undivided surplus" or "net income" (popularly termed "patronage savings") on the basis of patronage. Its patronage savings are determined at the close of each fiscal year. These patronage savings are thereupon, as a rule, partly refunded in cash and partly left with petitioner as loan capital in accordance with the decision of the board of directors, to be approved by the members.

If petitioner should have been permitted to register with the Bituminous Coal Division as a "distributor" it would be able to purchase coal in cargo or carload quantities from "producers" at the mines and receive the allowable discount fixed by the Division on equal terms with other distributors. Obviously, if petitioner should be able to distribute the coal to its constituent retail cooperative associations at a cost less than the amount of the allowable discount, it would show a savings on the discount at the close of its fiscal year.

On May 22, 1941, the director of the Bituminous Coal Division entered the following order (R. 115) which was affirmed by the court below:

"It is Ordered That petitioner, Midland Wholesale Cooperative, may qualify as an intervening agency under paragraph 13 of Section 4 II (i) of the Act, for all sales of coal in not less than cargo or railroad carload lots to retail associations which are *bona fide* and legitimate farmers' cooperative organizations, in the following manner:

"(a) By certifying to the Bituminous Coal Division, under oath, the names of all its retail associations which are *bona fide* and legitimate farmers' cooperative organizations duly organized under the laws of the state in which they are incorporated;

"(b) By agreeing, under oath, that it will not accept or retain any discount, price allowance or commission on any bituminous coal which it purchases for resale to others (fol. 222) than the *bona fide* and legitimate farmers' cooperative organizations whose names are filed with the Division."

Petitioner hereby seeks to have the opinion of the court below reviewed and the above order set aside.

Subparagraph (b) of the order denies petitioner the right to register with the Division as a "distributor" and therefore prevents petitioner from receiving from "producers" the "maximum discount or price allowances," which Section 4 II (h) of the Act authorizes, on any bituminous coal which petitioner purchases for resale to its constituent member associations which are so-called consumers cooperative associations. The Division, however, authorizes petitioner to receive such discounts or price allowances from "producers" on all coal which petitioner would purchase for resale to its constituent member associations which are so-called "*bona fide* and legitimate cooperative farmers' organizations." The Division holds (R. 120) that the latter part of paragraph 13 of Section 4 II (i) grants an "*exemption*" to so-called farmers cooperative associations as distinguished from so-called consumers cooperative associations.

(2)—*Statute Involved.* The forepart of Section 4 provides for promulgation of a marketing code and further provides,

> "* * * The code shall contain the following conditions and provisions, which are intended to regulate interstate commerce in bituminous coal and which shall be applicable only to matters and transactions in or directly affecting interstate commerce in bituminous coal."

The forepart of Section 4 also provides that *producers* accepting membership in the code shall be code members. *Distributors* are not code members. Section 4 II provides that,

> "The Commission (Division) shall have power to prescribe for code members minimum and maximum prices, and marketing rules and regulations."

Section 4 II (e) provides that,

> "No coal subject to the provisions of this section shall be sold or delivered or offered for sale at a price below the minimum or above the maximum therefor established by the Commission (Division), and the sale or delivery or offer for sale of coal at a price below such minimum or above such maximum shall constitute a violation of the code."

Section 4 II (h) provides that,

> "The Commission (Division) shall, by order, prescribe due and reasonable maximum discounts or price allowances that may be made by code members to persons (whether or not code members), herein referred to as 'distributors,' who purchase coal for resale and sell it in not less than cargo or railroad carload lots; and shall require the maintenance and observance by such persons, in the resale of such coal of the prices and marketing rules and regulations established under this section."

Paragraph 12 of Section 4 II (i) provides that the following practices with respect to coal shall be unfair

methods of competition and shall constitute violations of the code:

> "Selling to, or through, any broker, jobber, commission account, or sales agency, which is in fact or in effect an agency or an instrumentality of a retailer or an industrial consumer or of an organization of retailers or industrial consumers, whereby they or any of them secure either directly or indirectly a discount, dividend, allowance, rebate, or a price other than that determined in the manner prescribed by this Act."

Paragraph 13 of Section 4 II (i) provides that,

> "It shall not be an unfair method of competition or a violation of the code or any requirement of this Act (1) to sell to or through any *bona fide* and legitimate farmers' cooperative association duly organized under the laws of any state, territory, the District of Columbia, or the United States whether or not such organization grants rebates, discounts, patronage dividends, or other similar benefits to its members; (2) to sell through any intervening agency to any such cooperative organization; or (3) to pay or allow to any such cooperative organization or to any such intervening agency any discount, commission, rebate, or dividend ordinarily paid or allowed, or permitted by the code to be paid or allowed, to other purchasers for purchases in wholesale or middleman quantities."

Section 12 of the Act authorizes cooperative marketing of coal:

> "Subject to the approval of the Commission (Division), a marketing agency may, as to its members or such marketing agency may, as between and among themselves, provide for the cooperative marketing of their coal, at prices not below the effective minimum prices or above the effective maximum prices prescribed in accordance with Section 4: Provided, that no such approval shall be granted by the Commission (Division) unless it shall find that the agreement under which such agency or agencies proposes to function (1) will not unreasonably restrict

the supply of coal in interstate commerce, (2) will not prevent the public from receiving coal at fair and reasonable prices, (3) will not operate against the public interest, and (4) that each such agency and its members have agreed to observe the effective marketing regulations and minimum and maximum prices from time to time established by the Commission (Division) and otherwise to conduct the business and operations of the agency in conformity with reasonable regulations for the protection of the public interest, to be prescribed by the Commission (Division)."

(3)—*Holdings of the Court Below.* The court below holds that petitioner is disqualified to be registered as a "distributor" because, if it should not use all of the allowable discounts in performing the services of a distributor, it would save the remainder thereof for refunding to its constituent retail member associations at the close of its fiscal year, which associations are consumers member associations as distinguished from so-called farmers member associations. The cooperative member associations, of course, would co-mingle savings which they receive from petitioner, if any, for refunding to their members, the ultimate consumers of the coal.

It should be pointed out in particular that petitioner would realize savings, too, on any charge it would add to the minimum price at the time of resale to its constituent member associations. The Division's order not only does not prohibit or control the refunding of patronage savings from this source, but in fact appears to *sanction* such refunding. This portion of the order is hereinafter alleged to be so obviously faulty as to prove the invalidity of the entire order.

Furthermore, the court holds that even if petitioner should not be able to save any of the allowable discount and should actually suffer a loss in the distribution of coal to its consumers member associations, it would, nevertheless, operate in violation of the Act as to such member